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NOTES.

CONSTITUTIONALITY OF THE FEDERAL EMPLOYERS' LIABILITY ACT AND ITS ENFORCEMENT IN STATE COURTS.—The Federal Employers' Liability Act of 1908,[1] establishing a liability on the part of interstate railroads in case of an employee's injury or death, and abolishing the defenses of assumption of risk and contributory negligence, was framed with close reference to the decision of the Supreme Court declaring the prior act of 1906 unconstitutional in that it embraced intrastate commerce,[2] and the present statute is strictly limited to interstate carriers and

[1] 35 Stat. at L. 65, c. 149, amended April 5, 1910, 36 Stat. at L. 271, c. 143.

[2] Employers' Liability Cases (1908) 207 U. S. 463, 489; 60th Cong. 1st Sess. H. R. p. 4526.

employees engaged in interstate commerce.[3] The Supreme Court in the earlier case had suggested that such a law might be validly enacted if so restricted.[4] The present law, having been approved in several Federal courts,[5] was definitely sustained in the recent decision of *Mondou* v. *N. Y., N. H. & H. R. R. Co.* (1912) 32 Sup. Ct. Rep 169, as a valid regulation of commerce, giving a right of action enforceable as of right in a State court.

While the power of Congress, under the commerce clause, was seldom asserted over transportation by land prior to the Interstate Commerce Act of 1887,[6] the increasing amount of such legislation renders important the judicial delimitation of this field of Congressional activity. Certain principles in regard to this subject have, however, become well settled. Commerce is broadly defined as including "every species of commercial activity among the several States."[7] Regulation consists in prescribing "the conditions upon which it shall be conducted,"[8] and extends to the instrumentalities and the persons who conduct it.[9] But as Congress is restricted to the exercise of delegated powers, it is obvious that there must be a definite relation between legislation and the commerce it is designed to regulate.[10] The statute in question, then, can only be valid if its provisions actually facilitate or at least affect the act of commerce, and the expediency of abolishing the fellow servant doctrine can furnish it no support.[11] The court recognizes this as the crucial question in maintaining that the imposition of such a liability would impel the carrier to avoid negligence and prevent interruption to commerce through injury to employees. Any criticism of the decision, therefore, must be directed against this finding of fact. From the standpoint of precedent, the constitutionality of the measure has been urged because Congress has long regulated the relation of employers and employees engaged in navigation;[12] but this contention loses much force from the fact that the power of Congress over interstate transportation by land is not coincident with its authority over navigation, as the latter finds an additional source in the Constitutional provision giving Federal courts exclusive admiralty and maritime jurisdiction.[13] However, the decisions applying the provisions of the Safety Appliance Act relating to the assumption of

[3]It is a matter of some doubt, however, as to when an employee is engaged in interstate commerce. Johnson *v.* Great Northern Ry. Co. (1910) 178 Fed. 380; see 69 Central Law Journal 166.

[4]Employers' Liability Cases *supra,* 494.

[5]Watson *v.* St. Louis, etc. Ry. Co. (1909) 169 Fed. 942; but see 20 Harv. L. Rev. 481; Hackett, Federal Employers' Liability Act, 22 Harv. L. Rev. 38; Hoxie *v.* N. Y., N. H. & H. R. R. Co. (1909) 82 Conn. 363.

[6]See *In re* Debs (1894) 158 U. S. 564, 579.

[7]Adair *v.* U. S. (1907) 208 U. S. 161.

[8]Gloucester Ferry Co. *v.* Pennsylvania (1884) 114 U. S. 196, 203, 204.

[9]Northern Pac. Ry. Co. *v.* Washington (1912) 32 Sup. Ct. Rep. 160; 12 COLUMBIA LAW REVIEW 174.

[10]Adair *v.* U. S. *supra.*

[11]If, however, the statute meets this test the motives actuating Congress are irrelevant. See Doyle *v.* Continental Ins. Co. (1876) 94 U. S. 535, 541.

[12]Gregory, Commerce Clause, 5 Mich. L. Rev. 419, 425, 434; Wisner, Federal Legislation Concerning Employees, *id.* 639, 640; see Spain *v.* St. Louis etc. R. R. Co. (1907) 151 Fed. 522, 524.

[13]*In re* Garnett (1890) 141 U. S. 1, 12.

risk[14] and of the Hepburn Act respecting the responsibility of an initial carrier[15] indicate that the regulation of a carrier's liability for negligence may relate to commerce. This being determined, the principal case seems clearly sound in holding that the act offends no other provision of the Constitution. The Fifth Amendment cannot be invoked against it, as there is no right of property in any rule of the common law,[16] and such a classification as is here made has been repeatedly sustained;[17] and the right to make such a regulation carries with it the power to prohibit contracts in derogation thereof.[18]

The refusal of the Connecticut court to take jurisdiction of the action brought under the statute, presented the issue whether the principles of comity which permit one State, according to its domestic policy, to offer or withold a forum for the enforcement of a right arising under the law of another State,[19] govern the relations between a State and the Federal government in regard to cases arising under the laws of the United States. It was early settled that the jurisdiction of this class of cases was not, by the mere force of the Constitution, vested exclusively in the Federal courts,[20] and where Congress has not so placed it,[21] actions may be brought in State courts under Federal statutes.[22] In some instances, however, State courts have declined jurisdiction under similar circumstances, under the rule that one sovereignty will not enforce the penal law of another.[23] Although this rule should be limited to cases where the penalty enures to the direct benefit of the State,[24] it has been applied where the statute has given the right of action to an individual.[25] In the principal case it was further argued that the law need not be enforced as it violated the public policy of the State, but the court declared that since acts of Congress are the law of the several States,[26] there could be no inconsistency between the policy of the State and National governments, and that the duty of the State to take jurisdiction of such an action is coincident with the power to do so.[27] It is difficult to see why this doctrine should not be applicable to all cases, whether civil or penal, where Congress has not made the jurisdiction of the Federal courts

[14]See Schlemmer *v.* Buffalo etc. Ry. Co. (1907) 205 U. S. 1.

[15]See Southern Pac. Ry. Co. *v.* Crenshaw Bros. (1909) 5 Ga. App. 675.

[16]Munn *v.* Illinois (1876) 94 U. S. 113.

[17]See Louisville etc. R. R. Co. *v.* Melton (1909) 218 U. S. 36, 52; Tullis *v.* Lake Erie & W. R. R. Co. (1899) 175 U. S. 348.

[18]Chicago etc. R. R. Co. *v.* McGuire (1910) 219 U. S. 549.

[19]See Northern Pac. R. R. Co. *v.* Babcock (1894) 154 U. S. 190; Chicago etc. R. R. Co. *v.* Rouse (1899) 178 Ill. 132; Texas & Pac. Ry. Co. *v.* Richards (1887) 68 Tex. 375; Faulkner *v.* Hyman (1886) 142 Mass. 53.

[20]See The Moses Taylor (1866) 4 Wall. 411, 428.

[21]See Van Patten *v.* Chicago etc. R. R. Co. (1896) 74 Fed. 981.

[22]Southern Pac. Ry. Co. *v.* Crenshaw Bros. *supra.*

[23]U. S. *v.* Lathrop (N. Y. 1819) 17 Johns. 4.

[24]Huntington *v.* Attrill (1892) 146 U. S. 657; Chesapeake Ry. Co. *v.* Bank (1896) 92 Va. 495; Dicey, Conflict of Laws, (2nd ed.) 208.

[25]Brigham *v.* Claflin (1872) 31 Wis. 607; but see Henderson Nat. Bank *v.* Alves (1891) 91 Ky. 142.

[26]Claflin *v.* Houseman (1876) 93 U. S. 130; Hoover *v.* Robinson (1872) 3 Neb. 437.

[27]Southern R. R. Co. *v.* Crenshaw *supra.*

exclusive. But since the judicial power of the United States cannot be delegated,[28] the jurisdiction of the State courts cannot be derived from the statute,[29] but must be inherent in the State court. Since this fact was present in the case under consideration, there seems to have been no reason to deny the relief sought.[30]

CLAIMS OF SECURED CREDITORS AGAINST INSOLVENT ESTATES.—In the recent case of *Price* v. *Hosterman Lumber Co. et al* (W. Va. 1911) 73 S. E. 55, it was held in accordance with the majority of American decisions that a secured creditor, upon a general assignment on the part of the debtor, need not diminish his provable claim by realizing on his security, but might receive dividends upon the entire debt *pari passu* with the unsecured creditors.[1] This doctrine, the so-called chancery rule, seems preferable on principle to the rule of bankruptcy, under which the creditor, unless he surrenders his collateral, can base his claim for dividends only upon so much of the debt as remains unsatisfied after crediting upon it the realized or estimated value of the security.[2] It is familiar law that collateral security is simply a guarantee, and in no way alters the principal obligation or the primary liability, at common law, of the debtor's personalty.[3] The property pledged is security not merely for so much of the debt as its value will represent, but for the debtor's full performance.[4] That this is true, if proof be needed, is indicated by the fact that the giving of security is not considered payment *pro tanto,* nor can the holder be required to surrender the pledge on the receipt of an amount equal to its value in payment upon the debt. It follows, then, that it must be the understanding of the parties in such transactions, in accordance

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[28]See Martin *v.* Hunter's Lessee (1816) 1 Wheat. 304, 330. This principle does not preclude the authorization of the exercise of non-judicial functions by the State courts. Robertson *v.* Baldwin (1897) 165 U. S. 275.

[29]The holding in the lower court that the act attempted to confer jurisdiction upon the State courts confuses "jurisdiction" with the "right to adjudicate upon." See 11 COLUMBIA LAW REVIEW 711.

[30]Since the jurisdiction of the State courts is derived solely from the State constitution and laws, it would seem that the power of the courts to take cognizance of these cases could be withdrawn by appropriate legislation.

[1]People *v.* Remington (1890) 121 N. Y. 328; In the Matter of Bates (1886) 118 Ill. 524, 531; see note to People *v.* Remington 8 L. R. A. 458

[2]Much controversy has arisen as to the origin and basis of the bankruptcy rule. See dissenting opinion of White, J., in Merrill *v.* Nat. Bank of Jacksonville (1899) 173 U. S. 131. Early bankruptcy statutes directed a "rateable" or "ratelike" distribution. See Bromley *v.* Goodere (1743) 1 Atk. 75. The present laws both in this country and in England are mandatory in directing the application of the bankruptcy rule by the bankruptcy courts. See dissenting opinion of White, J., in Merrill *v.* Nat. Bank *supra.* It is suggested, however, that even if the courts did not originally feel obliged to adopt the bankruptcy rule because of statutory provision, it was in fact approved from convenience rather than on any principle of equity. It was a rule of practice. See Jervis *v.* Smith (N. Y. 1869) 7 Abb. Pr. [N. S.] 217; Bromley *v.* Goodere *supra;* Orders of Court (1794) 4 Bro. Ch. 548, 551.

[3]See Hauselt *v.* Patterson (1891) 124 N. Y. 349.

[4]Moses *v.* Ranlet (1822) 2 N. H. 488.